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Replacing Context for Plain Meaning in *United States v. Cox*

I. INTRODUCTION

In *United States v. Cox*,[1] the U.S. Court of Appeals for the Seventh Circuit had a chance to adopt a rule of construction established by the Supreme Court in *Flores-Figueroa v. United States*,[2] but failed to do so. Instead, the court relied on its own interpretation of the "context" of the federal statute to reach a result[3] that is inconsistent with the Supreme Court's rule in *Flores-Figueroa* and is unworkable in its application to other statutes. The court's holding is an unwarranted and unnecessary use of discretion that, if followed by other courts and applied to other laws, will result in inconsistent and arbitrary results.

In *Cox*, the law at issue was 18 U.S.C. § 2423(a), which prohibits the knowing transportation of an individual younger than eighteen years of age for the purpose of prostitution. The defendant, Tommy Cox, was convicted for violating this law and argued on appeal that "knowingly" attaches to the fact that the individual is a minor.[4] This would require that the prosecution prove not only that the defendant knew he was transporting an individual, but also that the defendant knew the individual he was transporting was under the age of eighteen. The court declined to follow the Supreme Court's construction of a similar law in *Flores-Figueroa* and instead held that "knowingly" does not describe the mens rea requirement for the age element of the law.[5] In doing so, the court relied on dicta from a concurring opinion in *Flores-Figueroa* and used its own interpretation of the context of the law to determine the law's meaning.[6] The court also based its decision on the non-controlling

1. 577 F.3d 833 (7th Cir. 2009).
2. 129 S. Ct. 1886 (2009).
3. *Cox*, 577 F.3d at 837–38.
4. *Id*. at 834–36.
5. *Id*. at 838.
6. *Id*. at 837–38.

position of four sister circuit cases, all of which were decided before the Supreme Court's ruling in *Flores-Figueroa*.[7]

The issue of statutory construction has a long and interesting history, and *Cox* is the most recent in a long line of inconsistent cases trying to ascertain the legislature's intent behind various statutes. Instead of viewing *Flores-Figueroa* as a definitive resolution of an entire line of cases by the country's High Court, the Seventh Circuit set forth a rule that is really not a rule at all; rather, it is a call for the use of unchecked judicial discretion as to the meaning of statutes. In reaching its holding, the Seventh Circuit committed a number of analytical errors including the following: unwarranted reliance on non-controlling cases; incorrect application of the *Flores-Figueroa* rule; and flawed consideration of the legislative history of 18 U.S.C. § 2423(a).

The court should have followed strictly the rule in *Flores-Figueroa* for a number of theoretical reasons. First, a strict rule prevents judges from trampling the rights of disfavored minorities. Second, applying "knowingly" to the age element of § 2423(a) leads to a more punitive and less arbitrary result. Third, strictly applying *Flores-Figueroa* would have advanced the principle of fair notice.

II. *UNITED STATES V. COX*

The case of *United States v. Cox* was argued before the U.S. Court of Appeals for the Seventh Circuit on February 24, 2009, and decided August 18, 2009. The facts of the case and the court's holding are summarized in the following sections to give context and background for the subsequent analysis.

A. The Facts in Cox

In 2005, defendant Tommy Cox met sixteen-year-old Quantan Champion "on a telephone party line," and later in a Chicago hotel.[8] Cox told Champion that "he could make a lot of money as a prostitute," and Champion agreed out of financial necessity.[9] Cox promoted Champion as a prostitute, which included taking nude pictures of him, setting prices "for different sexual acts," and posting

7. *Id*. at 836–37.
8. *Id*. at 834.
9. *Id*.

the pictures and prices online.[10] Under their agreement, Cox would set up the time and place for the rendezvous in exchange for half of the proceeds.[11] After moving from Chicago to Atlanta in 2006, Cox returned several months later to get Champion and take him to Atlanta, where Cox continued to prostitute Champion under the terms of their agreement.[12] Eventually, Champion moved back to Chicago and refused Cox's attempts to get him to return to Atlanta.[13] Champion's return to Chicago put an end to his prostitution.[14]

The United States Secret Service became aware of Cox's prostitution scheme when an employee of an online travel company reported Cox's use of stolen credit cards to rent hotel rooms.[15] Cox was charged with "transporting a minor in interstate commerce with the intent that the minor engage in prostitution, in violation of 18 U.S.C. § 2423(a), . . . persuading, inducing, enticing, or coercing an individual to travel in interstate commerce to engage in prostitution, in violation of 18 U.S.C. § 2422(a). . . . [and] violating 18 U.S.C. § 1029(a)(3), based on his possession and use of credit cards and account numbers . . . ."[16] After Cox pleaded guilty to the use of the credit cards, the Government filed two motions *in limine*.[17] The first "sought a ruling that [prosecutors] did not have to prove that Cox knew that Champion was a minor in order to obtain a conviction under 18 U.S.C. § 2423(a)."[18] The other related to an evidentiary rule that is beyond the scope of this Note.[19] The court granted both motions, and the jury found Cox guilty on each remaining count at trial.[20] The court's granting of the motions *in limine* was the issue on appeal in *United States v. Cox*.[21]

10. *Id.*
11. *Id.*
12. *Id.* at 835.
13. *Id.*
14. *Id.*
15. *Id.* at 834.
16. *Id.* at 835.
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.*
21. *Id.*

B. The Holding in Cox

The court in *Cox* held that the district court was correct in finding that "for purposes [of] § 2423(a) the Government need not prove that Cox knew that Champion was a minor."[22] In reaching this holding, the court first considered the text of the statute:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.[23]

Cox argued that "'knowingly' modifies not only the transitive verb 'transports' but also the verb's direct object. Therefore, according to Cox, 'knowingly' also reaches . . . 'an individual who has not attained the age of 18 years.'"[24] Under this interpretation, the Government would have to prove that Cox knew Champion was a minor. The court addressed this argument by joining the Second, Third, Fourth, and Ninth Circuits in their holdings to the contrary and asserting that "the most natural reading of § 2423(a) is that the adverb 'knowingly' modifies only the verb 'transports' and does not extend to the victim's minor status."[25]

The court next addressed Cox's argument that if "knowingly" is not applied to the age element of § 2423(a), it is rendered redundant.[26] The court cited 18 U.S.C. § 2421 in rebuttal.[27] Section 2421 is virtually the same as § 2423(a) except it contains no age requirement and has a different term of imprisonment.[28] The court then stated that "[t]he only reasonable reading of § 2421 is one under which the adverb 'knowingly' acts only on the verb 'transports' and not on the noun 'individual.'"[29] If this is the case,

22. *Id*. at 838.

23. 18 U.S.C. § 2423(a) (2006).

24. *Cox*, 577 F.3d at 836.

25. *Id*.

26. *Id*. at 836–37.

27. *Id*.

28. The term of imprisonment for § 2421 is defined as "not more than 10 years," whereas the term of imprisonment for § 2423 is "not less than 10 years or for life."

29. *Cox*, 577 F.3d at 837.

then "knowingly" would not be considered redundant in § 2423(a), and the interpretation of § 2423(a) that is most consistent with § 2421(a) would be the one proposed by the Government.[30]

The defendant's next argument which the court addressed was that § 2423(a) should be interpreted in a manner similar to that of the child pornography laws at issue in *United States v. X-Citement Video, Inc.*[31] In *X-Citement Video*, the Supreme Court interpreted a child pornography law to apply "knowingly" to the age requirement in two provisions of 18 U.S.C. § 2252(a).[32] However, the court distinguished the case at hand from *X-Citement Video* by pointing out that in *X-Citement Video*, the factor that determined whether distributing explicit photos was illegal was the age of the individual in the photos.[33] Therefore, even though applying "knowingly" to the age requirement was not "[t]he most natural grammatical reading" of the statute, "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[34] The *Cox* court reasoned that because transporting *any* individual by means of interstate commerce for purposes of prostitution, regardless of age, is illegal, the defendant is already on notice of the illegality of his conduct and need not know the victim's age.[35]

Next, the court considered Congress's intent behind the statute and concluded that the purpose of Congress in enacting the statute is best fulfilled by not applying "knowingly" to the age element of § 2423(a).[36] Congress, the court reasoned, was concerned with protecting minors from sexual exploitation.[37] Therefore, requiring prosecutors to prove that defendants knew a victim was a minor would make conviction too difficult and would reward ignorance instead of punishing the sexual exploitation of minors.[38]

30. *Id.*
31. *Id.*
32. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).
33. *Cox*, 577 F.3d at 837.
34. *X-Citement Video*, 513 U.S. at 68, 72.
35. *Cox*, 577 F.3d at 837.
36. *Id.*
37. *Id.*
38. *See id.*

The *Cox* court's final consideration was the Supreme Court's recent ruling in *Flores-Figueroa*.[39] The defendant did not address this case because *Cox* was argued February 24, 2009, several months before the Supreme Court decided *Flores-Figueroa*. Rather, the court brought this point into consideration of its own accord.[40] In *Flores-Figueroa*, the Supreme Court interpreted a law very similar in terms of construction to § 2423(a) to apply "knowingly" to every item in the list following the transitive verb.[41] To avoid following the rule of construction created in *Flores-Figueroa*, the court relied on language stating that "the inquiry into a sentence's meaning is a contextual one" and that in a "special context" a different interpretation may be appropriate.[42] The court also pointed to Justice Alito's concurring opinion, which singled out § 2423(a) as an example of a statute that should not be interpreted in accordance with the rule used by the majority.[43]

III. THE CONVOLUTED ISSUE OF STATUTORY INTERPRETATION

The issue of whether to enforce a law according to the plain meaning of the text or according to what Congress intended by the statute's passage is an issue that has troubled courts for years. In addition, the line of cases dealing with federal identity theft laws leading up to *Flores-Figueroa* is instructive as to the legal background of *Cox*.

A. The Persistent Problem of Statutory Interpretation

Two historical examples illustrate the tension that can arise between plain meaning and legislative intent. First, in 1889, the Court of Appeals of New York had to decide whether to let the plain language of probate laws allow a boy who murdered his grandfather to inherit under his grandfather's will.[44] The court held that the grandson could not inherit under his murdered grandfather's will because it was "inconceivable" that such was the intent of the

39. *Id.* at 838.

40. *See id.*

41. *See id.*

42. *Id.* (quoting Flores-Figueroa v. United States, 129 S. Ct. 1886, 1891 (2009)) (internal quotation omitted).

43. *Id.* (citing *Flores-Figueroa*, 129 S. Ct. at 1895–96 (Alito, J., concurring)).

44. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

legislature, so the plain language of the law could be ignored.[45] Later, in 1978, the Supreme Court was forced to decide whether the plain language of a statute protecting endangered species should bar the completion of a dam into which Congress had already poured $78 million, in order to preserve the snail darter, a three-inch fish that was discovered in 1973 and found to be endangered.[46] The Court held that the Endangered Species Act of 1973 required halting the dam's construction in spite of the implied approval of the dam by Congress in the form of continued funding.[47] The Court explained its rejection of a contrary congressional intent thus:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.[48]

In both cases, the courts were forced to decide if they should enforce what Congress said or what it intended to say.

Along with deciding whether to do what Congress said, or meant to say, courts must also implicitly decide whether Congress can intend anything other than what it actually legislates. Justice Scalia articulated one influential philosophy on this matter as follows: "Relying on the statement of a single Member of Congress or an unvoted-upon (and for all we know unread) Committee Report to expand a statute beyond the limits its text suggests is always a dubious enterprise."[49]

B. Flores-Figueroa *and the Interpretation of Federal Identity Theft Laws*

Until May 2009, a split existed among the circuits over how 18 U.S.C. § 1028A(a)(1), a federal identity theft law, should be interpreted. The statute imposes a two-year prison term on an individual who commits predicate felonies and "knowingly transfers,

45. *Id*. at 190.

46. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 166–68 (1978).

47. *Id*. at 194–95.

48. *Id*.

49. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1894–95 (2009) (Scalia, J., dissenting).

possesses, or uses, without lawful authority, a means of identification of another person."[50] The First,[51] Ninth,[52] and D.C.[53] Circuits held that for an individual to be convicted under this law, she must know that the means of identification belonged to another individual—thereby not punishing individuals who, by chance, strung together digits for a social security number that actually belonged to a person. The Eighth,[54] Eleventh,[55] and Fourth[56] Circuits held, to the contrary, that violators do not need to know that the means of identification belonged to an actual person—punishing those individuals who by chance or accident used the means of identification of another person.

The Supreme Court recently resolved this circuit split in *Flores-Figueroa* when it sided with the First, Ninth, and D.C. Circuits in holding that "knowingly" attaches to the requirement that the identification belong to another person.[57] The Court reasoned that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."[58] The Court's holding was based on the plain meaning of the language in the statute, and the Court noted that "[n]o special context is present" that would require a deviation from the plain language.[59]

IV. ANALYSIS

In the following sections, this Note will analyze the Seventh Circuit's reasoning and holding in *Cox* by considering the following: the rule that can be drawn from the holding; the errors in the court's reasoning; and how the court should have ruled in *Cox*.

50. 18 U.S.C. § 1028A(a)(1) (2004).

51. United States v. Godin, 534 F.3d 51 (1st Cir. 2008).

52. United States v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008).

53. United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008).

54. United States v. Mendoza-Gonzales, 520 F.3d 912 (8th Cir. 2008), *vacated by* 129 S. Ct. 2377 (2009).

55. United States v. Hurtado, 508 F.3d 603 (11th Cir. 2007).

56. United States v. Montejo, 442 F.3d 213 (4th Cir. 2006).

57. 129 S. Ct. 1886, 1889–90 (2009).

58. *Id*. at 1890.

59. *Id*. at 1891.

A. The Rule from Cox

In looking at what rule can be drawn from *Cox*, it is perhaps more instructive to look first at what the rule is not: The rule is not an extension of *Flores-Figueroa*, nor is it a rule of construction at all. Rather, *Cox* is an exercise of judicial policymaking slapped with the label of "context" and supported by non-controlling precedent.

1. Cox *is not an extension of the rule in* Flores-Figueroa

The rule in *Cox* is not an extension of the rule in *Flores-Figueroa*. *Cox* and *Flores-Figueroa* were argued on February 24 and 25, 2009, respectively, so *Flores-Figueroa* was not available for the appellant in *Cox* to argue. *Cox* was not decided until August 18, 2009, several months after the Supreme Court decided *Flores-Figueroa*; however, other than the court's cursory discussion of *Flores-Figueroa*, the opinion in *Cox* appears to be entirely uninfluenced by *Flores-Figueroa*. In fact, parts of the *Cox* opinion directly contradict what the Supreme Court held in *Flores-Figueroa*. For example, in addressing the defendant's grammatical argument that "knowingly" should apply to the age requirement of § 2423(a), the court in *Cox* reasoned:

> [I]n our view the most natural reading of § 2423(a) is that the adverb "knowingly" modifies only the verb "transports" and does not extend to the victim's minor status. To adopt Cox's argument would mean that we would have to read the adverb "knowingly" to modify not only the verb "transports" but also the noun and the dependent clause. As the Fourth Circuit noted, this would be a grammatically absurd result.[60]

This "grammatically absurd result" is exactly the interpretation called for by the Supreme Court in *Flores-Figueroa* and labeled the most "natural."[61] In fact, the Government in *Flores-Figueroa* argued for a grammatical interpretation of the statute identical to the interpretation decided upon by the court in *Cox*.[62] However, the Supreme Court summarily dismissed the Government's argument.[63] The Supreme Court then proceeded to give five examples of

60. United States v. Cox, 577 F.3d 833, 836 (7th Cir. 2009).

61. *Flores-Figueroa*, 129 S. Ct. at 1890.

62. *Id*.

63. *Id*.

everyday sentences in which "knowingly" modifies not only the transitive verb immediately following, but also the noun and the dependent clause.[64] If the court in *Cox* had strictly followed the rule in *Flores-Figueroa*, it still could have reached the same conclusion, but only if it ruled solely on the basis of context and in spite of the plain meaning of the statute. After all, the Supreme Court left open context as a possible reason to deviate from the plain meaning of the statute.[65] However, the *Cox* court did not choose this route, and the grammatical construction asserted in *Cox* is simply not in accord with the Supreme Court's clearly stated analysis of the most natural way to read such a statute.[66]

2. The court in Cox *carved out an exception to the general rule of construction established in* Flores-Figueroa

The rule in *Cox* can most appropriately be viewed as an exception carved out of the general rule of construction that "where a transitive verb has an object . . . an adverb (such as knowingly) that modifies the transitive verb [indicates] how the subject performed the entire action . . . ."[67] To other courts considering the interpretation of § 2423(a), the proper application of *Cox* simply would be to mirror the holding in *Cox* and rule that "knowingly" does not extend to the age element of the statute.

Extending the *Cox* exception to statutes other than § 2423(a) becomes more complicated. Courts following *Cox* would attempt to look at "context" to determine whether a given statute calls for an

64. *Id*. at 1890–91 ("[I]f a bank official says, 'Smith knowingly transferred the funds to his brother's account,' we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's. . . . If [an] official were to say, 'Smith *knowingly* sent a bank draft to the capital of Honduras,' then the official has suggested that Smith knows his geography. . . . If a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling. If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese. Or consider the Government's own example, '"John knowingly discarded the homework of his sister."' The Government rightly points out that this sentence 'does not *necessarily*' imply that John knew whom the homework belonged to. But that is what the sentence, as *ordinarily* used, does imply." (citation omitted)).

65. *Id*.

66. *Id*. at 1890–91.

67. *Id*. at 1890.

interpretative method different from that used in *Flores-Figueroa*.[68] Factors that the court could consider in determining if the statute falls within the exception would include the factors considered in *Cox*, such as 1) how the statute in question fits into the overall statutory framework,[69] 2) whether the underlying conduct prohibited by the statute is "already unlawful" under another statute,[70] and 3) the congressional intent behind the statute.[71] Following the lead of the court in *Cox*, a court would then be free to consider what is "reasonable" under the first factor, what is "best" according to the second factor, and what is not "implausible" in light of the third factor.[72] The court would thus decide according to its own judgment whether the statute in question should fall within the *Cox* exception to the *Flores-Figueroa* method of interpretation.[73] Aside from the overtly subjective nature of this test, a number of problems exist with the reasoning and subsequent rule in *Cox*.

B. The Court's Errors in Cox

The court in *Cox* committed a number of errors in holding that "knowingly" does not attach to the age element of § 2423(a). The court's errors include the following: 1) The court improperly followed non-controlling precedent from its sister circuits instead of following the Supreme Court's holding in *Flores-Figueroa*; 2) the court's discussion of grammatical construction is in direct contrast to the Supreme Court's reasoning in *Flores-Figueroa*; and 3) the context of § 2423(a) upon which the court relied is neither clear nor persuasive.

1. The court improperly followed non-controlling precedent from its sister circuits instead of following the Supreme Court's holding in Flores-Figueroa

In reaching its holding, the court in *Cox* relied heavily on the fact that four of its sister circuits have held that "knowingly" does

68. *See* United States v. Cox, 577 F.3d 833, 838 (7th Cir. 2009).
69. *Id*. at 836–37.
70. *Id*. at 837.
71. *Id*.
72. *Id*.
73. *See id*. at 838.

not apply to the age element of § 2423(a).[74] The court sided with the Second,[75] Third,[76] Fourth,[77] and Ninth[78] Circuits. However, the one significant factor that distinguishes *Cox* from the cited circuit cases is that *Cox* was decided after the Supreme Court's ruling in *Flores-Figueroa*. For this reason, it was improper for the court to simply follow its sister circuits.

When the *Cox* court considered *Flores-Figueroa* at the end of its discussion of interpretation, it referenced a concurring opinion by Justice Alito to justify the *Cox* holding.[79] Justice Alito concurred in *Flores-Figueroa* out of concern "that the Court's opinion may be read by some as adopting an overly rigid rule of statutory construction."[80] He went on to downplay the reasonableness of the majority's grammatical analysis and emphasize that a statute's context may rebut the presumptive interpretation called for by the majority.[81] Justice Alito then pointed to two examples of statutes that, in his mind, should not be interpreted according to the majority's rule: 21 U.S.C. § 2423(a) (the statute at issue in *Cox*) and 21 U.S.C. § 861(a)(1).[82] In justifying departure from the majority rule when interpreting § 2423(a), Justice Alito offered as support that "[t]he Courts of Appeals have uniformly held that a defendant need not know the victim's age to be guilty . . . ."[83] This reasoning, however, is itself problematic for the same reason the *Cox* court's use of its sister circuits' reasoning is problematic: The circuit cases were decided before *Flores-Figueroa* and would have been reasoned differently, and possibly decided differently, if they had been decided after *Flores-Figueroa*. Moreover, Justice Alito did not write the majority opinion, so reliance on his concurring opinion was not

74. *Id*. at 836–37.

75. United States v. Griffith, 284 F.3d 338, 350–51 (2d Cir. 2002).

76. United States v. Hamilton, 456 F.2d 171, 173 (3d Cir. 1972).

77. United States v. Jones, 471 F.3d 535, 538–39 (4th Cir. 2006).

78. United States v. Taylor, 239 F.3d 994, 996 (9th Cir. 2001).

79. *Cox*, 577 F.3d at 838.

80. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1895 (2009) (Alito, J., concurring).

81. *Id*.

82. *Id*. at 1895–96 ("21 U.S.C. § 861(a)(1), which makes it unlawful to 'knowingly and intentionally . . . employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate' drug laws, does not require the defendant to have knowledge of the minor's age.").

83. *Id*. at 1895.

mandatory, though it was perhaps reasonable. Additionally, the *Cox* court must have known that in case of an appeal to the Supreme Court, at least one justice would side with the *Cox* court's holding.

However, Justice Alito's opinion was not the only concurring opinion: Justice Scalia, joined by Justice Thomas, wrote a concurring opinion urging a strict textual interpretation. Scalia and Thomas asserted that it is not appropriate to look beyond the text of a statute if "[t]he statute's text is clear."[84] After all, it is the text of the statute that is voted upon and signed into law, not statements by Members of Congress. Therefore a statute's interpretation should be based on its plain text, not its context. It is easy to see how Justices Scalia and Thomas would rule on *Cox* if it were considered on appeal.

2. The court's discussion of grammatical construction is in direct contrast to the Supreme Court's reasoning in Flores-Figueroa

The *Cox* court's written opinion concerning the grammatical construction of § 2423(a) was apparently completed prior to the issuance of the *Flores-Figueroa* opinion because the two are entirely incompatible.[85] By engaging in its own contradictory discussion of the grammatical construction of the statute, the court deviated not just from the majority opinion of *Flores-Figueroa*, but also from the rule proposed by Justice Alito in his championed concurring opinion. Justice Alito suggested that courts seeking to apply the majority's rule "begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption."[86] The *Cox* court should have at least made its opinion appear consistent with *Flores-Figueroa* by doing as Justice Alito suggested: admitting that "knowingly" presumptively applies to the age requirement but pointing to the context as grounds for overcoming the presumption.[87] Failing to follow the Supreme Court's rule and instead relying on the court's own interpretation was an error.

The court's discussion of the interpretation of § 2423(a) in light of § 2421 is also flawed. The text of § 2421 is as follows:

84. *Flores-Figueroa*, 129 S. Ct. at 1894–95 (Scalia, J., concurring).
85. *See supra* text accompanying notes 57–63.
86. *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring).
87. *Id*.

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.[88]

The court reasoned that "[s]ection 2421 is virtually identical to § 2423(a) but for the age element in the latter."[89] The court continued by saying, "[t]he only reasonable reading of § 2421 is one under which the adverb 'knowingly' acts only on the verb 'transports' and not on the noun 'individual.'"[90] The court then reasoned that if "knowingly" only properly attaches to "transports" in § 2421, not "individual," then by extension in § 2423(a), "knowingly" should apply only to "transports" and not to "an individual who has not attained the age of 18 years."[91]

To rebut the court's interpretation of § 2421, and by extension its interpretation of § 2423(a), a look at the statute as a whole is enlightening, as is an application of the Supreme Court's interpretive techniques for understanding "ordinary English,"[92] as found in *Flores-Figueroa*.

To "knowingly transport" an individual without also having knowledge of the individual is impossible, and much more "grammatically odd"[93] than to "knowingly transport" an individual of which the violator has knowledge. This is especially so considering the second element of the crime requiring "intent that such individual engage in prostitution."[94] For a violator of this statute to knowingly transport an individual *with intent* that the individual engage in prostitution requires that at the time of transportation, the violator must necessarily have knowledge that an individual is being transported. If the violator does not have knowledge of the individual, the violator could never have intent for that individual to engage in prostitution.

88. 18 U.S.C. § 2421 (2006).

89. United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009).

90. *Id*. This reasoning mirrors the reasoning in *United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006); however, neither case is sound.

91. 18 U.S.C. § 2423; *Cox*, 577 F.3d at 837.

92. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890 (2009).

93. *Jones*, 471 F.3d at 539.

94. 18 U.S.C. § 2421 (2006); *see also* 18 U.S.C. § 2423(a) (2006) (requiring "intent that the individual [minor] engage in prostitution").

For example, if someone were to approach a potential violator of § 2421, asking her to drive a vehicle across state lines for the purpose of prostitution, the potential violator would "knowingly transport" the vehicle. But what if a prostitute happened to be hidden in the van, unbeknownst to the potential violator? It would be impossible for the van driver to possess any kind of intent regarding the individual without also possessing knowledge of the individual in the van. Therefore, in order to meet the element of intent under § 2421, the violator must also have knowledge that what is being transported is an individual. Absence of the violator's knowledge of the individual *necessarily* negates the intent element, thereby releasing our truly ignorant hypothetical van driver from liability under § 2421.

The preceding analysis of § 2421 is consistent with the Supreme Court's understanding of "ordinary English"[95] in *Flores-Figueroa*. The Supreme Court's analysis of 18 U.S.C. § 1028A(a)(1) included the following examples of the way English is typically understood: "Thus, if a bank official says, 'Smith knowingly transferred the funds to his brother's account,' we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's," and "[i]f we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese."[96]

Following this same analysis, it is just as logical to conclude that the phrase "[w]hoever knowingly transports any individual"[97] means that the person described knows not only that she is transporting some object but also that the object being transported is an individual. In justifying its contrary interpretation, the court in *Cox* said "[t]here is no good reason to read § 2423(a) differently."[98] Apparently, the Supreme Court's holding to the contrary is not a "good reason" in the eyes of the Seventh Circuit. Because the court's analysis of § 2421 was flawed, its interpretation by extension of § 2423(a) was also flawed.[99]

95. *Flores-Figueroa*, 129 S. Ct. at 1890.
96. *Id.* at 1889–90.
97. 18 U.S.C. § 2421.
98. United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009).
99. *See id.*

3. The context upon which Cox *relied is not sufficiently clear to warrant departure from the Supreme Court's ruling in* Flores-Figueroa

In declining to follow the Supreme Court's ruling in *Flores-Figueroa*, *Cox* relied on reasoning from Justice Alito's concurring opinion, stating, "'the inquiry into a sentence's meaning is a contextual one,' and . . . a 'special context' might call for a different statutory interpretation."[100] The court improperly found that such a "special context" existed for § 2423(a). As previously discussed, the court in *Cox* also pointed to Justice Alito's suggestion that § 2423(a) possessed a special context that justified departure from the majority's rule.[101] In addition, the *Cox* court engaged in its own discussion of the context of § 2423(a) which was flawed and inconsistent with the contextual analysis found in *Flores-Figueroa*.[102]

In deciding that § 2423(a) should be interpreted according to its special context, the *Cox* court looked almost entirely at the reason the legislature enacted the statute.[103] The *Cox* court reasoned that its grammatical construction of § 2423(a) was "consistent with congressional intent that minors need special protection against sexual exploitation."[104] The court continued by reasoning that "[i]t seems implausible that Congress would want it to be harder to prove a violation of § 2423(a) . . . when the purpose of [the statute] is to provide heightened protection for minors against sexual exploitation."[105]

The *Cox* court's reasoning is strikingly similar to the argument raised in *Flores-Figueroa* and rejected by the Supreme Court. The government argued that the purpose of § 1028A(a)(1) is to "provid[e] enhanced protection for individuals whose identifying information is used to facilitate the commission of crimes."[106] Therefore, a limited application of the knowledge mens rea requirement would make sure that "potential offenders will take great care to avoid wrongly using IDs that belong to others, thereby

100. *Id*. at 838 (quoting *Flores-Figueroa*, 129 S. Ct. at 1891).

101. *See supra* text accompanying notes 76–80.

102. *See Flores-Figueroa*, 129 S. Ct. at 1892–93; *Cox*, 577 F.3d at 837–38.

103. *Cox*, 577 F.3d at 837.

104. *Id*.

105. *Id*.

106. *Flores-Figueroa*, 129 S. Ct. at 1892 (internal quotations omitted).

enhancing the protection that the statute offers."[107] The Supreme Court rejected this argument by looking to the "statute's history (outside of the statute's language) [which] is inconclusive."[108] The history of § 1028A(a)(1) showed that a number of statements in the House Reports interchangeably used the terms "identity fraud" (which does not require that the ID belong to another individual) and "identity theft" (which requires that the ID belong to someone else).[109] However, the Court also discussed House Reports where Congress distinguished between fraud and theft;[110] therefore, the Supreme Court labeled the statute's history as inconclusive. The important point is that the Supreme Court looked beyond the fact that the law's purpose is to punish people who use the ID of another person, and looked to whether Congress intended that violators must know that the ID belongs to another person.

Obviously, a statute punishing the transportation of minors for prostitution is intended to "protect[] . . . minors against sexual exploitation,"[111] just as a statute punishing identity theft is meant to protect "individuals whose identifying information is used to facilitate the commission of crimes."[112] However, following the Supreme Court's holding in *Flores-Figueroa*, this weak showing of congressional intent is not enough to constitute a special context. To find special context, the *Cox* court also needed to conclusively show from the statute's history that the legislature intended to punish violators who acted unknowingly;[113] only then would a special context be present. The court in *Cox* did not show any such legislative intent, but merely concluded that "[i]t seems implausible that Congress would want ["knowingly" to apply to the age element.]"[114] The result of the *Cox* court's construction, as the Ninth Circuit put it, is that "[i]f someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of

107. *Id*.
108. *Id*.
109. *Id* at 1892–93.
110. *Id*. at 1893.
111. United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009).
112. *Flores-Figueroa*, 129 S. Ct. at 1892 (internal quotations omitted).
113. *Id*.
114. *Cox*, 577 F.3d at 837.

what the victim says or how the victim appears."[115] The legislative history of § 2423(a) shows that this result is contrary to the intended purpose of the statute.

The House Reports considering the Child Protection and Sexual Predator Punishment Act of 1998, which led to the passage of § 2423(a), contain several indications that Congress intended for "knowingly" to attach to the age element of the statute. For example, in describing the purpose behind the Act, the committee repeatedly described violators and violations of the statute with words and phrases such as "pedophile," "target a child," "lure children," "prey on our nation's children," "prey on innocent children," and "stalk children."[116] In describing the purpose of the law, it would be a mischaracterization to say that the statute aims to punish those who commit crimes on minors "regardless of what the victim says or how the victim appears."[117] The language of the committee makes it quite clear that the law was intended to punish individuals who purposefully prey on and exploit individuals they know to be children.

A comment in the report about a specific provision relating to the Internet is particularly persuasive in confirming the previous point: "Those who believe they are victimizing children, even if they come into contact with a law enforcement officer who poses as a child, should be punished just as if a real child were involved."[118] In this way, the legislature showed its intention to punish violators based primarily on their beliefs and intentions to prey on minors, not on what the facts happened to be. It is true that the Act expanded criminality and imposed harsher punishments for a wide variety of sexual crimes involving minors, and that this expansion itself could be viewed as a legislative call to interpret the statute to punish even the unknowing; however, the legislature did not reveal this intent through statements in its committee reports. Considering the evidence on both sides of the argument, the legislative history of § 2423(a) is inconclusive at best.

115. United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001).

116. H.R. REP. NO. 105–557, at 678, 680–81, 689, 692, 701 (1998) (discussing the Child Protection and Sexual Predator Punishment Act of 1998).

117. *Taylor*, 239 F.3d at 997.

118. H.R. REP. NO. 105–557, at 688 (1998).

C. How the Court Should Have Ruled

"The modern reality . . . is that when the Supreme Court . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts . . . ."[119] If the Seventh Circuit had applied the Supreme Court's mode of analysis, it would have broken from its sister circuits and held that "knowingly" applies to the age element of § 2423(a). First, the court should have looked for the ordinary meaning of the statute and found, as the Supreme Court did, that most people would read the statute as applying "knowingly" to the age element. Then, operating under the presumption that the ordinary meaning governs, the court could have looked for a "special context" to decide if some alternate interpretation was warranted.[120] As set forth in this Note,[121] the court should have acknowledged a lack of special context and ended its inquiry.

Though this approach would possibly allow greater discretion to the court, and thus greater potential for abuse than the purely textual inquiry urged by Justices Thomas and Scalia in their concurring opinion in *Flores-Figueroa*, it would have avoided the precedential and interpretative problems accompanying the court's actual holding. A key to properly applying *Flores-Figueroa* as a rule, and not a mere suggestion, is for courts to look for a truly conclusive context for the statute, one that clearly shows that Congress intended the law to be read in a manner inconsistent with the ordinary English meaning. In the vast majority of legislative histories, such congressional conclusiveness, especially conclusiveness contrary to ordinary English, would be "special" indeed and could properly warrant departure from the plain meaning.

The above approach to interpreting the statute in *Cox* would have had the following theoretical advantages over the approach followed by the court in *Cox*: First, it would operate as a strict rule that would prevent judges from trampling the rights of disfavored minorities; second, applying "knowingly" to the age element of § 2423(a) would result in a more punitive, less arbitrary result than the

119. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

120. *See* Flores-Figueroa v. United States, 129 S. Ct. 1886, 1891 (2009).

121. *See supra* text accompanying notes 98–116.

court's actual holding; and third, a strict application of precedent promotes predictability and fair notice.

1. A strict rule prevents judges from trampling the rights of disfavored minorities

Absent from any critique of *Cox* is a discussion of how the court used its discretion to improperly punish the sympathetic and undeserving Tommy Cox. Such an argument is absent because nothing could be further from the truth. By all accounts, Tommy Cox was as unsympathetic as defendants come. He was shamelessly pimping out a sixteen-year-old boy who "'went along with it' because he had no money."[122] He was using stolen credit cards to set up rendezvous in hotels and keeping half of all the filthy money for himself.[123] Cox, of all people, deserved to be punished, and he—and sex offenders in general—could appropriately be labeled a disfavored minority of society. However, a deserving defendant is no reason to denigrate the judicial process. The Supreme Court voiced this opinion in *Tennessee Valley Authority v. Hill* by quoting Robert Bolt's character Sir Thomas More as follows:

> The law, Roper, the law. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[124]

Cut down the law is just what the court did to get after Tommy Cox and others who sexually exploit minors. The grammatical constructions of § 1028A(a)(1) (the law at issue in *Flores-Figueroa*) and § 2423(a) are identical. The legislative histories of both § 1028A(a)(1) and § 2423(a) are inconclusive. The overarching difference between *Flores-Figueroa* and *Cox* appears to be the class of defendant being punished—a difference that is not legally significant. To find a special context for the law, the court's reasoning was

122. United States v. Cox, 577 F.3d 833, 834 (7th Cir. 2009).

123. *Id.* at 835.

124. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) (citing Robert Bolt, A Man for All Seasons, Act I, 147 (Three Plays, Heinemann ed. 1967)) (internal quotations omitted).

essentially that the law's purpose is to protect children from sexual exploitation; therefore, Congress must have intended for the statute to be read broadly to get after such devils as Cox.[125]

Following this reasoning, what statute is above such an interpretation? Is it not the case that every fraud statute is meant to protect individuals from fraud, every homicide statute is meant to protect individuals from homicide, and every environmental statute is meant to protect the environment from degradation? If the *Cox* reasoning were applied to these statutes, courts could cut them down to get after the devils in our country by simply finding a special context. Any statute could be interpreted contrary to its ordinary English meaning if the defendant (or class of defendants) were unsympathetic enough that her punishment was within the expansive purpose of the statute. This is simply an inappropriate level of discretion claimed by the judiciary. "Discretion increases the potential for abuse by a biased decision maker,"[126] and for Tommy Cox, that potential became a reality.

The identity of a defendant should have no bearing on how a law is interpreted. Carrie Buck, a mentally handicapped woman, found no refuge in the law when she appealed her forced order of sterilization to the Supreme Court.[127] What she found was unabashed bigotry because of her status as a disfavored minority. The same judicial body that would later read into the Fourteenth Amendment the right for every woman to have an abortion[128] justified denying relief to Ms. Buck with the following:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[129]

The injustices suffered by former slaves are no less poignant; likewise, the majority of such injustices are not based on law, but on

125. *See Cox*, 577 F.3d at 837.

126. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 328 (2007).

127. Buck v. Bell, 274 U.S. 200 (1927).

128. Roe v. Wade, 410 U.S. 113 (1973).

129. *Buck*, 274 U.S. at 207 (citation omitted).

the discretion of courts to interpret laws to oppress a disfavored minority. It is important to clarify that this section is not included to evoke sympathy toward pedophilic sex offenders by comparing them to people born with mental disabilities or varying colors of skin. The point is that it is improper and unjust for two identically structured laws to be interpreted differently because of whom is being punished.

If the court had applied *Flores-Figueroa* strictly, the above problems would have been mitigated, if not eliminated. The judiciary should not trust itself with the interpretive liberty exercised in *Cox* because judicial liberty leads to social injustice. The iconic symbol of justice is a blindfolded woman with a sword and a scale.[130] This image of blind justice is only a reality when courts do not have discretion to remove the blindfold and selectively decide who gets the sword's punishment.

Strict rules empower the judiciary to make difficult, just decisions.[131] On the surface it may appear that a court willing to look to attenuated assertions of legislative intent is empowered to reach a fair result in spite of the text of the laws; however, when a court is willing to use its own discretion, it loses the vital power to make unpopular decisions. It is doubtlessly difficult for judges to stand up for the rights of the Carrie Bucks, or Tommy Coxes of the world. However, "frail men and women will stand up to their unpleasant duty . . . if they can stand behind the solid shield of a firm, clear principle . . . ."[132] This power to do the unpopular was well exercised by the Supreme Court in *TVA v. Hill* when the Court enforced the plain meaning of a statute to save a seemingly insignificant fish by scrapping a $78 million dam.[133] If judges are to be umpires,[134] discretion lets them avoid the jeers that necessarily accompany a correct, but unpopular call. Such crowd-pleasing is improper because

130. Dennis E. Curtis, *Images of Justice*, 96 YALE L.J. 1727, 1755 (1987).

131. *See* Robinson, *supra* note 126, at 328.

132. Scalia, *supra* note 119, at 1180.

133. *See Tenn. Valley Auth.*, 437 U.S. 153 (1978).

134. *See* John Roberts, *My job is to call balls and strikes and not to pitch or bat*, CNN, August 24, 2010, http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html ("Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.")

elected Members of Congress, the ball players, should be the ones trying to avoid jeers—it is their job, not the umpire's.

2. Applying "knowingly" to the age element of § 2423(a) leads to a more punitive, less arbitrary result

Congress's purpose for enacting § 2423(a) was to punish people who knowingly exploit children—"[t]hose who believe they are victimizing children."[135] For the garden-variety pimp or any other individual who transports any prostitute whatsoever in interstate commerce, § 2421 is in place with a maximum prison term of ten years. For the special group of deviants perverse enough to knowingly commit this crime with children, Congress reserved § 2423(a). A long line of Supreme Court cases favors a heightened scienter element, not a lessened one.[136] Heightened scienter is especially appropriate with a statute carrying a ten-year minimum sentence.

The unjust outer limits of *Cox*'s interpretation of § 2423(a) can be illustrated when one considers that not all violators of § 2423 actually know the ages of those whom they transport. Whether caused by the violator not asking or by the prostitute lying, the result is the same; the determinative factor in whether the ignorant violator receives a ten-year maximum sentence or a ten-year minimum sentence then becomes the birth date of the prostitute, which is entirely outside the violator's control unless she were to ask for valid photo identification. Having considered the House Reports, it seems dubious that Congress would want punishment to hang solely on something as arbitrary as whether the prostitute happened to be seventeen and a half or eighteen and a half, not what the violator knew or intended. Under the court's interpretation, the statute punishes according to the prostitute's age, not the violator's intent, purpose, or knowledge.

135. H.R. REP. NO. 105–557, at 688 (1998).

136. *See, e.g.*, Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890 (2009); Staples v. United States, 511 U.S. 600 (1994) (considering the elements of a law prohibiting the possession of fully automatic firearms); Liparota v. United States, 471 U.S. 419 (1985) (considering the elements of a law prohibiting the illegal use of food stamps); Morissette v. United States, 342 U.S. 246 (1952) (considering the elements of a law prohibiting the conversion of property belonging to the United States).

3. A strict rule promotes predictability and fair notice

The court eliminated predictability in statutory interpretation by using broad discretion to interpret a statute contrary to the Supreme Court's interpretation of an identically structured statute just a few months prior. In the words of Aristotle, personal discretion "should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement."[137] Language is not one of those areas for which it is or should be difficult to frame rules, at least within the limits of applying "knowingly" to subsequent elements of a criminal statute; the Court in *Flores-Figueroa* proved this by presenting a very clear and workable rule. Furthermore, because of the imprecision and ambiguity that some argue is ever present in written language,[138] a predictable rule of interpretation is even more necessary.

For those special instances when strictly applying *Flores-Figueroa* clearly would undermine the legislature's intent, *Flores-Figueroa* properly left an escape route to allow courts to deviate from the rule. Such deviations, when necessary, would "soften the hard edges" of the rule.[139] However, such deviations should result only after the court begins with the presumptive construction set forth in *Flores-Figueroa* and then uses the same structured method of analysis as the Supreme Court to find a special context that rebuts the ordinary meaning presumption.[140] If courts are free to decide on their own what constitutes a special context, any court could exercise its discretion to effectively let the exception swallow the rule like the court did in *Cox*.

When predictability is absent from the judicial interpretation of criminal laws, the judiciary violates the principal of fair notice.[141] This is akin to the Roman emperor "Caligula, who reportedly 'wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.'"[142] Whether the law is

137. ERNEST BARKER, TRANSL., THE POLITICS OF ARISTOTLE, book III, ch. xi, § 19 at 127 (Oxford, 1946).

138. Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 984 (1995).

139. *Id*. at 955.

140. *Id*. at 963.

141. *See* Robinson, *supra* note 126, at 328.

142. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1895 (2009) (Scalia, J., concurring) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 (1765)).

written in fine print and posted on a high pole or interpreted in a different manner for different people, the result is the same: People do not know what the law is.

It is true that the *Cox* court's holding may have advanced the principles of predictability and notice on a small scale; however, on a larger scale the court's holding was detrimental. Considering the precedent from other circuits interpreting the same law, it was arguably more predictable for the *Cox* court to settle upon a similar interpretation.[143] For example, the hypothetical pimp who was considering transporting someone, whose age she did not know, could have been influenced not to do so by the circuit court opinions that violators of § 2423(a) need not know their victim is a minor. From this point of view, applying a *Flores-Figueroa* interpretation in *Cox* would have been unpredictable. However, *Cox* introduced unpredictability and lack of notice for potential violators of all other similarly worded statutes. The looming question is whether courts will follow the *Flores-Figueroa* grammatical rule of construing "knowingly," or whether they will follow the *Cox* court's lead and use discretion to enforce laws against particularly unsympathetic classes of criminals. Without a uniform rule of construction, the public has no way of knowing what a law means until a court issues an opinion on it.

V. CONCLUSION

The court in *Cox* had a chance to apply a rule of construction from *Flores-Figueroa* that would have simplified statutory interpretation, increased judicial predictability, and avoided numerous problems associated with judicial discretion. However, the court incorrectly followed its sister circuits and a concurring opinion in *Flores-Figueroa* to perpetuate a rule that invites courts to exercise unchecked discretion. For these reasons, *Cox* was incorrectly decided.

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143. United States v. Cox, 577 F.3d 833, 836 (7th Cir. 2009).

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